UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RMH FRANCHISE CORPORATION d/b/a
APPLEBEE'S RESTAURANT

and **Case 28-CA-145185**

HEIDI JOHNSON, an Individual

GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

The National Labor Relations Act (the Act) protects employees' rights to engage in concerted activities under Section 7 of the Act. This right is the foundation for several rights, including the right to strike, the right to join a union, and the right to join together for collective actions including collective lawsuits which affect terms and conditions of employment. RMH Franchise Corporation d/b/a Applebee's Restaurant (Respondent) has maintained an "Arbitration Agreement" which is applicable to all current and former employees employed within the United States at all material times. Each of Respondent's employees is required to sign the Arbitration Agreement as a condition of employment. In relevant part, the Arbitration Agreement requires all disputes arising out of the employment relationship to be brought on an individual basis only and specifically precludes any class, collective, or private attorney general representative basis. By requiring, as a condition of employment, employees to resolve any disputes arising out of their employment relationships with Respondent on an individual basis, Respondent has been interfering with, restraining,

and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

II. BACKGROUND

A. Respondent's Operations

Respondent is an Arizona corporation with an office and place of business in Phoenix, Arizona, and is engaged in the business of operating retail restaurants. (Motion at 2)[1] It has purchased and received at its Phoenix, Arizona place of business goods valued in excess of $50,000 directly from points outside the State of Arizona during the 12-month period ending January 28, 2015. (Motion at 2)

B. Respondent's Arbitration Agreement and Acknowledgement Form

Respondent has maintained an Arbitration Agreement since about July 28, 2014 which all employees were required to sign as a condition of employment. (JTX at 2; Complaint at 2; Answer at 2) The Arbitration Agreement was applicable to all current and former employees employed within the United States.

The applicable Arbitration Agreement states in relevant part:

> Except as it otherwise provides, this Agreement also applies, without limitation, to disputes regardless of the date of the date of accrual arising out of or related to the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, retaliation, discrimination or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act ("ERISA") (except for claims for employee benefits under any employee benefit plan sponsored by the Company and (a) covered by ERISA or (b) funded by insurance), Affordable Care Act, Genetic Information Non-Discrimination Act, and state statutes, if

[1] JTX___ refers to Joint Exhibit followed by the exhibit number; Complaint, Answer, and Acknowledgement refer to documents referenced by the October 29, 2015, Executive Secretary Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board in which the entire case was transferred to the Board including the Complaint, Answer, and Arbitration Agreement Acknowledgement.

> any, addressing the same or similar subject matters, and all other state statutory and common law claims. []
>
> Both the Company and you agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding ("Class Action Waiver")…You will not be retaliated against, disciplined or threatened with discipline as a result of your exercising your rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum. However, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. (JTX 2)

Respondent required employees to sign a document titled Employee's Specific Acknowledgement of Applicability of RMH Companies' Dispute Resolution Program and Employment Arbitration Policy (Acknowledgement) which stated in relevant part:

> I specifically acknowledge that I have received a copy of RMH Companies' Dispute Resolution Program and Employment Arbitration Policy. I understand that these policies provide the opportunity for prompt and objective review of employment concerns. I understand that arbitration is the final, exclusive, and required forum for the resolution of any employment-related dispute between RMH and myself, that is based on a legal claim. I agree to submit to arbitration under RMH Companies' Employment Arbitration Policy any employment-related dispute based on a legal claim that I may have with RMH Companies.
>
> * Claims for wages or other compensation
> * Class, collective and / or representative actions
> * "Tort" claims, like claims for personal injury or emotional stress
> * Wrongful termination
> * Claims for discrimination, including claims based on: race, sex, religion, national origin, age, disability, marital status, sexual orientation
> * Claims for benefits under any RMH employee benefits program, unless otherwise specified in the plan
> * Claims for a violation of any noncriminal federal, state, or other governmental law
> * Claims for or based on upon illegal harassment

(Complaint at 2-3; Answer at 2; Acknowledgement)

III. ARGUMENT

A. The Maintenance and Enforcement of Arbitration Agreements and the Acknowledgement

1. Legal Standard

In *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1-7 (2012), the Board set forth the appropriate legal framework for considering the legality of employers' policies and agreements which limit collective and class legal activity in non-union settings. The Board recently reaffirmed its *D.R. Horton* decision in *Murphy Oil USA, Inc.*, slip op. at 2 (2014). In *D.R. Horton*, the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer restricts the employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-6. Thus, Section 7 vests employees with the right to invoke - without employer coercion, restraint, or interference – procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. Id., slip op. at 10. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-68 (1978) (commenting that "it has been held that the 'mutual aid or protection' clause protects employees . . . when they seek to improve working conditions through resort to administrative and judicial forums").

2. Respondent's Arbitration Agreement and Acknowledgement Violate Section 8(a)(1) of the Act because they Interfere with Employees' Section 7 Right to Participate in Collective and Class Litigation

The Arbitration Agreement and Acknowledgement (collectively Agreements) at issue here violate Section 8(a)(1) of the Act because they interfere with employees' Section 7 right to engage in collective legal activity and because of ambiguities which interfere with employee ability to engage in protected concerted activity. As noted in the Joint Motion and

Stipulation of Facts, Respondent requires all employees to sign the Arbitration Agreement as a condition of employment. Further, as noted in the Complaint and Answer, Respondent has maintained the Acknowledgement which limits the resolution of all employment-related disputes to the procedures under the Arbitration Agreement. Once executed, these Agreements limit, if not completely extinguish, employees' Section 7 right to choose to act concertedly or individually in any future legal dispute with Respondent.

Even if these Agreements were not conditions of employment, they would be unlawful. What is at stake here is employees' Section 7 right to decide for themselves among the options that the law affords them to address their employment-related concerns. Section 7 does not impose collective activity on any employee. Instead, the Act protects each employee's "freedom of association" – or ability to *choose* concerted action – if, in the employee's judgment, that course appears warranted. Section 7 has long been understood to protect not only the filing of lawsuits, grievances, or administrative charges, but also participation in the adjudication of the same, such as attending hearings, providing affidavits, and/or testifying. See, e.g., *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-97 (5th Cir. 1976) (executing affidavits supporting lawsuit); *Dick Gidron Cadillac*, 287 NLRB 1107, 1110 (1988) (testifying at arbitration hearing); *Supreme Optical Co.*, 235 NLRB 1432, 1432-33 (1978) (testifying at discharged employee's unemployment hearing), enfd. 628 F.2d 1262 (6th Cir. 1980); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (attending arbitration hearing, participating in arbitration). Consistent with those principles, the Board held in *D.R. Horton* that Section 7 vests employees with the right to invoke – without employer coercion, restraint, or interference – procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D.R. Horton, Inc.*, 357

NLRB No. 184, slip op. at 10, n.24. For all these reasons, an irrevocable waiver of employees' prospective Section 7 rights eliminates employees' choice as to whether to engage in protected conduct or not, necessarily interferes with employees' exercise of their statutory rights and violates Section 8(a)(1) of the Act.

Finally, these agreements cannot be justified because employees have a Section 7 right to refrain from engaging in collective legal activity. The essential element of the Section 7 right to refrain from engaging in collective legal activity is the protection of employee choice. Thus, while employees have the right to bring collective and class legal actions, they also have a right to arbitrate any particular claim on an individual basis if they so choose.[2] The Agreements, however, bind employees to an irrevocable waiver of their prospective Section 7 rights to engage in collective legal activity and, thus, preclude their making such choices as to any future claim. Such irrevocable waivers of employees' prospective Section 7 right to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are "a continuing means of thwarting the policy of the Act," and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), quoted in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 4. The Arbitration Agreement and Acknowledgement "[seek] to erect 'a dam at the source of supply' of potential, protected activity" and "thereby interfere[ ] with employees' exercise

[2] Nothing herein, or in the Board's decision in *D.R. Horton*, should be read to preclude: (1) an employer from requiring an employee to arbitrate an individual claim on an individual basis, where no collective legal activity is sought by the employee, as long as the employee retains the right to bring any class or collective claim on a class or collective basis; or (2) employers and employees from lawfully agreeing to individually arbitrate a particular claim in dispute, or otherwise to forego bringing a particular claim to a judicial forum or arbitration on a class or collective basis. Rather, it is the interference with employees' prospective right to choose to act individually or concertedly as to class or collective claims in *future* labor disputes that unlawfully interferes with employees' Section 7 rights here.

of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). To permit Respondent to so limit its employees' rights to act collectively, in the guise of protecting employees' right to refrain from engaging in collective legal activity, would be to stand Section 7 on its head.

In addition to the violation by compelling arbitration, Respondent violated the Act by the ongoing maintenance of the Agreements. The Agreements have several references to "any dispute," but does not define whether class and collective actions are limited to lawsuits. The use of the broad term "any dispute" proscribes more activities than just class and collective lawsuits. Because of its broad language, the Agreements can and should be interpreted to prohibit more than class and collective lawsuits and can be interpreted to prohibit protected concerted activity especially absent a definition of collective action and in light of the broad application to disputes or controversies. Consequently, the terms of the Agreements are unlawful as vague and ambiguous. As described below, any ongoing maintenance of the Agreements also violates the Act as it interferes with access to the Board and its processes based on the language of the Agreements.

The Agreements cannot be analogized to a union waiver of Section 7 rights. The Board briefly touched on this issue in *D.R. Horton*, distinguishing the waiver by a union, noting that "the negotiation of such a waiver [of the right to bring court action] stems from the exercise of Section 7 rights: the collective bargaining process." *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 10 (2012).[3] The Board has long held, with court approval, that employers cannot avoid the Act's obligations or obviate employees' rights under the Act, through

[3] The Board distinguished *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which addressed whether a union can agree to an arbitration clause waiving employee rights to bring court action under Title VII and the ADEA. Id. at 10-11. The Board therefore appears to have suggested that a waiver of collective claims might be enforceable if it were part of a collective bargaining process rather than an individual employment contract.

agreements with individual employees. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944), affirming, as modified 134 F.2d 70 (7th Cir. 1943), enfg., as modified 42 NLRB 85 (1942). As explained by the Supreme Court, "employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes." *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Consistent with this principle, individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, "constitute[] a violation of the Act per se," even when they are "entered into without coercion," as they are a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942),[4] enfg. *J.H. Stone & Sons*, 33 NLRB 1014 (1941), quoted in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 5. Pursuant to the same principle, the Board has regularly set aside settlement agreements which require employees to prospectively waive their right to act in concert with coworkers in disputes with their employer.[5] In this regard, in *D.R. Horton*, the Board expressly found arbitration agreements prohibiting collective legal activity to be comparable to "yellow dog" contracts prohibiting employees from joining labor unions. *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 5-6. Significantly, the Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements, as this conduct "has an inherent and direct tendency to

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[4] The Seventh Circuit affirmed the Board's holding and described the contract clause as a per se unlawful violation of the Act, even if "entered into without coercion" because it obligated the employee to "bargain individually," was a "restraint upon collective action" and rejected the respondent's comparison to arbitration clauses between a union and an employer. *NLRB v. Stone*, 125 F.2d at 756.

[5] See, e.g., *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (finding the employer unlawfully conditioned employees' reinstatement, after discharges for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Medical Center*, 328 NLRB 1094, 1005-06 (1999) (same); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (employer unlawfully conditioned discharged employee's severance payments on agreement not to help other employees in disputes against employer or to act "contrary to the [employer's] interests in remaining union-free," as the Board held that "future rights of employees as well as the rights of the public may not be traded away in this manner"). Cf. *BP Amoco Chemical–Chocolate Bayou*, 351 NLRB 614, 614-16 (2007) (upholding an informed settlement agreement).

interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . ."[6]

Here, the Agreements apply without limitation and regardless of the date of accrual. As a result, it interferes with employees' Section 7 rights even more than traditional yellow dog contracts, as the restrictions on protected activity remain in effect even after any employment relationship has ended, and are intended to use judicial authority to prohibit protected concerted activity.

The Acknowledgement doubles down on the Agreement's interference with employees' Section 7 rights. It reiterates that arbitration is the final, exclusive, and required forum for the resolution of any dispute arising from the employment relationship. The Acknowledgement requires the employee to submit to Respondent's Arbitration Agreement, including for any class, collective, or representative actions, and makes no mention of any exceptions for claims under the Act. The Acknowledgement, when read with the Agreement, leaves little doubt that Respondent is interfering with employees' Section 7 rights to engage in class or collective legal action. Cf. *AmEx Card Services Co.*, 363 NLRB No. 40, slip op. at 2 (2015) (finding both the arbitration agreement and form unlawful where each restricts class or collective actions in all forums).

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[6] *Hecks, Inc.*, 293 NLRB 1111, 1120-1121 (1989) (finding a violation by "requesting . . . employees to promise to be bound by the Respondent's written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company"); *Western Cartridge Co.*, 44 NLRB 1, 6-8 (invalidating individual employment contracts purportedly giving the right to fire any employee who "participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations,'" because they effectively restricted employees' right to engage in concerted activity); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), enfd. 117 F.2d 881 (7th Cir. 1941) (finding unlawful the individual contracts which were part of the employer's plan to discourage unionization. "Even if no explicit compulsion of [employees'] signatures had taken place, it is clear that the contracts were presented with the full weight and authority of the respondent's approval behind them").

In the instant case, as in *D.R. Horton* itself, the Agreements expressly require employees to arbitrate all disputes which might arise between the employee and Respondent, and prohibit representative, collective, and class actions. Therefore, Respondent violated Section 8(a)(1) of the Act by maintaining the Arbitration Agreement and Acknowledgment prohibiting collective legal activity.

3. Respondent's Maintenance of the Acknowledgement Violates Section 8(a)(1) of the Act because it Interferes with Employee Access to the Board and its Processes

Respondent's maintenance of the Arbitration Agreement also violates Section 8(a)(1) of the Act because the Agreement interferes with employees' access to the Board and its processes. The Board has made clear that mandatory arbitration policies which interfere with employees' right to file an unfair labor practice charge are unlawful. See, e.g., *Dish Network Corp.,* 358 NLRB No. 29, slip op. at 7-8 (2012); *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007). Thus, for example, in *U-Haul Co. of California*, the Board held that an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges, and that did not clarify that the policy did not extend to the filing of unfair labor practice charges. *U-Haul Co. of California*, 347 NLRB at 377-78.

The Agreement expressly states employees will not be disciplined for attempting to exercise their rights under Section 7 of the Act in any forum but explicitly states the Respondent may seek enforcement of the Arbitration Agreement under the Federal Arbitration Act in seeking dismissal of any such claims. Thus, by its explicit terms, the Arbitration Agreement prohibits retaliation for class or collective legal activity but not for the filing and

maintenance of a charge with the Board or otherwise accessing the Board's processes. The stated intent to seek enforcement of the Agreement and dismissal of any class, collective, or representative action under Section 7 of the National Labor Relations Act demonstrates Respondent's intent to avoid administrative claims with federal agencies including the Board. Therefore, Respondent's maintenance of the Agreement also violates Section 8(a)(1) of the Act, because the Agreement interferes with employees' access to the Board and its processes. Cf. *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 1-2 (2012) (finding unlawful a mandatory grievance and arbitration program which required arbitration of all claims related to employment including those under federal state or local statutes with the exclusion of criminal matters, workers' compensation, and unemployment compensation benefits).

The ambiguity about the pursuit of claims under the Act is compounded by the Acknowledgment which states it is "the final, exclusive, and required forum for the resolution of any employment-related dispute between RMH and myself, that is based on a legal claim" but makes no mention of employees exercising their Section 7 rights under the Act. The Board recently addressed a similar factual scenario where two documents were signed by employees giving seemingly contradictory information about rights under the agreement. *Amex Card Services, Co.*, 363 NLRB No. 40 (2015), where the respondent had an arbitration policy which was similar to the Arbitration Agreement in the instant case, stating that any claim on the National Labor Relations Act was not covered. *Amex Card Services, Co.*, 363 NLRB No. 40, slip op. at 2 (2015). However, as in the instant case, employees were required to sign a form in conjunction with the arbitration policy which gave the employees no right to any class, collective, or representative basis for any claims, but did not exclude claims under

the Act. *Id*. The Board there reiterated its prior holdings that where there is an ambiguity in a rule, the ambiguity is resolved against the respondent as the promulgator of the rule *Id.*, slip op. at 3. In the instant case, as noted above, there was already ambiguity contained in the language in the Arbitration Agreement. When the Acknowledgement's language is added to the Arbitration Agreement, even greater uncertainty is created for employees regarding what rights, if any, they have to pursue claims under the Act. As a result, the ambiguity must be resolved against the Respondent, as it was in *Amex Card Services, Co.*. The Arbitration Agreement and Acknowledgement, therefore, interfere with employees' access to the Board and its processes.

IV. CONCLUSION

Based on the foregoing reasons and the record evidence considered as whole, CGC respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint. Through its conduct, Respondent infringed upon the rights of its employees to engage in concerted activities, including concerted legal actions, without interference, restraint and coercion. The Board should so find and fashion an appropriate remedy which would require Respondent to: cease and desist from such unlawful conduct; rescind the unlawful provisions of the Agreements and notify the current and former employees of the rescission; post a notice at all locations including by electronic means, a proposed copy of which is attached, where the unlawful Agreements are or have been in effect; cease and desist from insisting upon the unlawful provisions of the Agreements, including from enforcing

those portions of the Agreements prohibiting class and collective actions; and order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Las Vegas, Nevada, this 19th day of November 2015.

Respectfully submitted,

/s/ Stephen Kopstein
/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD** in Case 28-CA-145185, was served via E-Gov, E-Filing, and Electronic Mail, on this 19th day of November 2015, on the following:

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NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain and enforce mandatory arbitration agreements that interfere with you rights to engage in collective legal activity and interfere with your access to the Board and its processes.

WE WILL NOT enforce that portion of our arbitration agreements that prohibit collective and class actions.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the unlawful provisions in our arbitration agreements and notify you of the rescission.

RMH FRANCHISE CORPORATION d/b/a APPLEBEE'S RESTAURANT
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**